Garda USA, Inc. v Sun Capital Partners, Inc.

2023 NY Slip Op 32460(U)

July 7, 2023

Supreme Court, New York County

Docket Number: Index No. 657031/2019

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

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GARDA USA, INC.,

Plaintiff,

- v -

SUN CAPITAL PARTNERS, INC., SUN CAPITAL PARTNERS MANAGEMENT VI, LLC, SUN SOS, LP, SUN HOLDINGS VI, LLC, and SOS ULTIMATE HOLDING, LLC,

Defendants.

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INDEX NO. 657031/2019

MOTION DATE 09/20/2022, 09/20/2022

MOTION SEQ. NO. 010 011

DECISION + ORDER ON MOTION

HON. MELISSA A. CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 406, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 723, 724, 725

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 425, 426, 427, 428, 429, 430, 453, 454, 455, 619, 620, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Nos. 010 and 011 are consolidated for disposition. In Motion Sequence No. 010, defendants Sun Capital Partners, Inc. (Sun Partners), Sun Capital Partners Management VI, LLC (Sun Management) (together, Sun), and SOS Ultimate Holding, LLC (SOS) (together

with Sun, defendants) jointly move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In Motion Sequence No. 011, plaintiff Garda USA, Inc. (Garda) moves, pursuant to CPLR 3212, for summary judgment in its favor.

Background

The facts underlying this action were discussed in a prior decision and order of the court (Friedman, J.), familiarity with which is presumed. Briefly, Garda is a security services company. This action arises out of Garda's failed attempt to acquire SOS, a mid-sized security services company, from Sun, a private equity firm. Sun had acquired a controlling interest in SOS from ZS Fund (ZS). Jonathan Kaye (Kaye), a Managing Director at Moelis & Company (Moelis), had managed that prior sale (NY St Cts Elec Filing [NYSCEF] Doc No. 429, defendants' response to Garda's Rule 19-a statement, ¶¶ 5-6; NYSCEF Doc No. 276, Jeffrey S. Bramson [Bramson] affirmation, exhibit 75, ¶ 18). Both Garda and nonparty Allied Universal Security Services (Allied), one of Garda's competitors, had previously expressed an interest in purchasing SOS. In the past, Sun did not consider selling to either of them (NYSCEF Doc No. 429, ¶ 5).

In May 2019, Garda's CEO, Stephan Crétier (Crétier), met with Kaye and disclosed Garda's interest in acquiring SOS (NYSCEF Doc No. 205, Bramson affirmation, exhibit 4, Crétier tr at 28-29; NYSCEF Doc No. 256, Bramson affirmation, exhibit 55, Kaye tr at 22-23). Kaye arranged for Crétier and Jean-Michel Filiatrault (Filiatrault), a Senior Vice President at Garda, to meet with Steven Liff (Liff), a Senior Managing Director at Sun, and Daniel Florian (Florian), a Managing Director at Sun (NYSCEF Doc No. 429, ¶ 9). Crétier proposed purchasing SOS for 1.4 to 1.5x the multiple of invested capital (MOIC); working off Sun's due diligence materials; and executing a transaction in 35-40 days with no financing conditions (NYSCEF Doc No. 206, Bramson affirmation, exhibit 5). Shortly thereafter, Sun resolved to explore a potential sale of

SOS to Garda, Allied, and two other security services companies (NYSCEF Doc No. 209, Bramson affirmation, exhibit 8 at 2; NYSCEF Doc No. 250, Bramson affirmation, exhibit 49, Florian tr at 73), and to strategize with Kaye for the limited purpose of pursuing interest from Allied (NYSCEF Doc No. 429, ¶ 25).

Garda and Sun Management, SOS's financial advisor, entered into an agreement dated **July 25, 2019** (the Confidentiality Agreement) concerning confidential "Evaluation Material" that Garda would receive in connection with a potential acquisition of SOS (the Transaction) (NYSCEF Doc No. 284, Robert H. Arnay [Arnay] affirmation, exhibit 4 at 1). Garda agreed that only those directors, officers, employees and advisors listed on Exhibit A (collectively, Representatives) to the agreement would receive Evaluation Material, though the list could be updated upon mutual written agreement (*id.*). The Confidentiality Agreement imposed mutual nondisclosure obligations as follows:

> "1. No disclosure of your interest in the Transaction or the Company will be made by your or your Representatives prior to the date of closing of the Transaction … except as may be otherwise (a) agreed upon by you and the Company …. The Company and the parties set forth in Exhibit B agree not to disclose the fact that the Parties are considering or discussing the Transaction to any third-party other than to those of its affiliates and its and their respective directors, officers, employees and advisors who are set forth on Exhibit B. Exhibit B may be updated from time to time upon mutual written agreement between the parties hereto.
>
> 2. The fact that the Company is providing Evaluation Material to your Representatives, the fact that the parties have had, are having or may have discussions concerning the Transaction, the timing or status of the Transaction, and any negotiations that may occur between you or your Representatives and the Company shall be deemed Evaluation Material and treated in accordance with the provisions hereof. All Evaluation Material will be held in complete confidence and, without the Company's prior written consent, will not be disclosed, in whole in part, to any person (other than such of your Representatives who need access to any such materials or

> information for purposes of evaluation or negotiating the Transaction)"

(*id.*).

Exhibit A lists Patrick Prince (Prince); Filiatrault; Félix Morin; Naomi Francouer; Patrick Belzile (Belzile); Deloitte Touche Tohmatsu Ltd. and its employees and partners; and Simpson Thatcher & Bartlett LLP and its employees and partners (*id.* at 5). Exhibit B lists Sun Capital and its directors, officers, employees and operating partners; Kirkland & Ellis LLP and its employees and partners; and Edward Silverman (Silverman), SOS's CEO (*id.* at 6). Exhibit A was amended four times between September 13 and October 20 (NYSCEF Docs. 285-288, Arnay affirmation, exhibits 5-8).

A no-waiver clause in Section 12 of the Confidentiality Agreement states that "[n]o failure or delay by the Company in exercising any right, power or privilege under this agreement shall operate as a waiver thereof, and no waiver … or modification hereof shall be effective, unless in writing and signed by an officer of the Company or other authorized person on its behalf" (NYSCEF Doc No. 284 at 3). Section 10 also provides:

> "You acknowledge that the Company and the Company's advisors shall be free to conduct the process in respect of the Transaction as they in their sole discretion shall determine, including, without limitation, negotiating and/or terminating negotiations with any prospective or interested parties at any time, with or without any reason therefor"

(*id.*).

Meanwhile, **prior** to the date of the Confidentiality Agreement with Garda, on **July 19, 2019**, Kaye approached Allied about acquiring SOS. Chandler Reedy (Reedy), a Managing Director at Warburg Pincus (Warburg), testified that Kaye told him "Garda has expressed interest

and … [Sun] [thinks] that there could be something interesting here"[1] (NYSCEF Doc No. 215, Bramson affirmation, Reedy tr at 12 and 21). Allied communicated its interest in SOS to Kaye (NYSCEF Doc No. 214, Bramson affirmation, exhibit 13, Steven Jones [Jones] tr at 78-79; NYSCEF Doc No. 215 at 19-20), who relayed this information to Sun (NYSCEF Doc No. 301, Arnay affirmation, exhibit 21). Kaye arranged for a July 31 meeting between Florian, Reedy and Jones, Allied's CEO (NYSCEF Doc No. 429, ¶ 37).

Jones testified that at that meeting, Florian stated "[Sun] had gotten several inbounds or several parties" interested in acquiring SOS and "didn't want it to get out in the industry that they were selling it, they were considering it" (NYSCEF Doc No. 214 at 90). Jones also testified that he was "first made aware of Sun … thinking of selling SOS and that Garda was an interested buyer pursuing it" in mid-July 2019 (NYSCEF Doc No. 214 at 78-79). Reedy, who was not present at the meeting, testified Kaye had earlier mentioned that Garda had expressed an interest in acquiring SOS (NYSCEF Doc No. 215 at 21). Florian confirmed in an August 6 email to Jones that "[Sun's] goal is to find out very quickly if there is something to do here or not. The other folks we are talking to have finalized NDAs are already at work" (NYSCEF Doc No. 305, Arnay affirmation, exhibit 25 at 4). Allied signed a non-disclosure agreement the next day with Sun Management as SOS's representative (NYSCEF Doc No. 306, Arnay affirmation, exhibit 26).

Garda submitted a letter of intent to acquire SOS on August 14 (NYSCEF Doc No. 4, complaint, exhibit 2; NYSCEF Doc No. 228, Bramson affirmation, exhibit 27 at 3), and a revised term sheet on August 30 (NYSCEF Doc No. 5, complaint, exhibit 3). Garda was aware that Sun had shown SOS to Allied and that Allied was "five days behind" (NYSCEF Doc No. 217, Bramson affirmation, exhibit 16 at 7). Sun had previously informed Garda that it expected at least one more

[1] Warburg, a private equity firm, had an ownership interest in Allied (NYSCEF Doc No. 214 at 16; NYSCEF Doc No. 215 at 14).

offer before the end of the month (NYSCEF Doc No. 216, Bramson affirmation, exhibit 15 at 1), and on August 29, Sun advised Garda that it had received another offer (NYSCEF Doc No. 270, Bramson affirmation, exhibit 69 at 1). Allied submitted a letter of intent to acquire SOS on August 26 (NYSCEF Doc No. 429, ¶ 51), and a revised term sheet on September 5 (NYSCEF Doc No. 213, Bramson affirmation, exhibit 12). Defendants chose to move forward with Garda (NYSCEF Doc No. 251, Bramson affirmation, exhibit 50, Liff tr at 185), though defendants never signed Garda's term sheet (NYSCEF Doc No. 218, Bramson affirmation, exhibit 17, Filiatrault tr at 143).

Garda repeatedly sought a period of exclusivity from Sun to finalize the Transaction (NYSCEF Doc No. 228 at 3; NYSCEF Doc No. 221, Bramson affirmation, exhibit 21; NYSCEF Doc No. 318, Arnay affirmation, exhibit 38 at 1). Liff expressed his concern that, if Sun granted exclusivity and the parties did not complete the Transaction, then "it is not a good outcome for me post telling other parties they have to stand down (knowing that if we go back to them they will know our lead horse collapsed)" (NYSCEF Doc No. 221). Crétier assured Liff that "[Sun] could park [Allied] for 4 weeks and [Allied] would still be around" (*id.*). On September 6, Liff informed Crétier that, despite having received "more than one compelling offer," Sun would grant Garda a short period of exclusivity to negotiate and execute a merger agreement (NYSCEF Doc No. 323, Arnay affirmation, exhibit 43 at 2-3).

Before an exclusivity agreement was formalized in writing, Kaye approached Sun on September 10 for an update, as he was meeting with Garda's decisionmaker, Paolo Notarnicola (Notarnicola) of BC Partners (BCP)[2] (NYSCEF Doc No. 326, Arnay affirmation, exhibit 46 at 3). Florian replied that there were "[n]o major updates" and that Sun planned on completing another

[2] Garda had announced in July 2019 that BCP, a private equity firm, would be acquiring an ownership interest (NYSCEF Doc No. 205 at 15-16 and 40; NYSCEF Doc No. 302, Arnay affirmation, exhibit 22). BCP's investment in Garda closed that October (NYSCEF Doc No. 210 at 230; NYSCEF Doc No. 263, Bramson affirmation, exhibit 62, Belzile tr at 17).

acquisition before reassessing whether it would sell SOS (*id.* at 2). Liff added that Allied came in "light by a very meaningful amount … i.e. 10's of millions" (*id.*). Florian also added that Allied "bid twice and are a good chunk low" and that Sun would "revisit[ ] in 6-8 weeks" (*id.* at 1). Kaye emailed Jones and Reedy on September 13 that "[i]t's clear to me [Sun] want to get this near term acquisition done …. My sense is that the other buyer is very committed (I will feel out what that actually means) but they won't be able to do anything until this deal gets done, either" (NYSCEF Doc No. 327, Arnay affirmation, exhibit 47). He advised Allied to "[s]tand by for now" (*id.*).

On September 14, Garda and SOS, as the "Company," executed an exclusivity agreement (the Letter Agreement) which reads, in part:

> "1. *Exclusivity*: The Company covenants and agrees that from the date of the execution by each of the Company and Garda or their authorized representatives of this letter agreement until 11:59 p.m. (Eastern Standard Time) on the date that is 21 days following the date of such execution (the 'Exclusivity Period'), none of the Company or its subsidiaries will, and they will cause their respective equityholders (including Sun Capital Partners, Inc.) … not to, directly or indirectly, solicit offers for, encourage, negotiate, discuss, or enter into any agreement, understanding or commitment regarding, a possible sale, merger, combination, consolidation, joint venture, partnership or other disposition of all or any material part of the Company … (a 'Company Sale') with any party other than Garda or provide any information to any party other than Garda regarding the Company …. [and] provided that, so long as Garda has satisfied the foregoing requirements and is otherwise working in good faith to consummate the Potential Transaction, the Company will extend the Exclusivity Period to the date that is 28 days following the execution of this letter agreement.…
>
> 2. *Confidentiality*: The Company and Garda agree that the existence or any of the terms or conditions of the Potential Transaction (including, without limitation, the identity of the parties hereto or their respective affiliates or the existence or contents of this letter agreement) or any documents relating thereto, and/or any discussions relating thereto, and/or any discussions related to any of the foregoing shall constitute (a) with respect to Garda, Evaluation Material (as defined in that certain agreement, dated as of July 25, 2019, by and between Sun Capital Partners Management VI, LLC

> and Garda (the 'Confidentiality Agreement') and (b) with respect to the Company, information covered by the second sentence of Section 1 of the Confidentiality Agreement, in each case, subject to the applicable provisions of the Confidentiality Agreement"

(NYSCEF Doc No. 289, Arnay affirmation, exhibit 9 at 1-2).

The Letter Agreement contained language that neither Garda nor SOS were obligated to proceed with the Transaction (*id.* at 2).

On September 16, Kaye emailed Sun for another update because he was meeting with the "lead deal partner" at BCP/Garda (NYSCEF Doc No. 329, Arnay affirmation, exhibit 49). In response, Liff wrote, "some things you don't know and we are trusting this stays CONFI," and the message was "[M]oelis not that involved as I made the intro to [S]un (Stephan)" (*id.*). Florian replied:

> "CATCH UP FOR U: We haven't caught up on this yet, and we should've discussed today, but G came in w[ith] a big value and we are giving em [sic] a shot on a tight leash as of this weekend (wasn't sure if we would get there). Note we didn't want to taint anything w [sic] you and your mtgs [sic] in Chicago and Stephan and sun and sos wanted to be hush hush so hope ya [sic] understand … others are highly interested … So if g doesn't deliver we have Oppty [sic] to sell and or hold (may just hold or allow A a shot) … G was well ahead of A in timing and value"

(*id.*).

Liff responded and asked Kaye to "PLS KEEP CONFI" (*id.*).

Meanwhile, Garda and Sun continued to conduct due diligence and negotiate the terms of a merger agreement during the exclusivity period, that Sun extended through **October 12**. The parties, though, failed to finalize the Transaction before that date. Crétier was aware "other buyers were waiting in the wings," but Garda did not seek an extension of the exclusivity period because the parties were working in good faith (NYSCEF Doc No. 355, Arnay affirmation, exhibit 75).

Over the next month, issues continued to arise, including the terms of the employment agreement for Silverman and others, potential exposure on multi-employer pension (MEP) plans and whether Sun would realize the promised 1.5x MOIC return (NYSCEF Doc No. 426, Bramson affirmation, exhibit 1 at 2; NYSCEF Doc No. 427, Bramson affirmation, exhibit 2 at 2). In addition, although Crétier had previously indicated that Garda could execute on the Transaction without any financing (NYSCEF Doc No. 206), that November, Garda approached BofA Securities, Inc. (BofA), TD Securities (USA) LLC (TD Securities), Barclays Capital Inc. (Barclays), J.P. Morgan Securities, LLC (JP Morgan), and Apollo Capital Management L.P. (Apollo) for debt financing (NYSCEF Doc No. 265, Bramson affirmation, exhibit 64 at 11-12). Between November 8 and November 11, those entities executed "joinder" agreements in which each agreed to be bound to the Confidentiality Agreement as Garda's Representative on the Transaction (NYSCEF Doc Nos. 349-350, 352-353 and 358, Arnay affirmation, exhibits 69-70, 72-73 and 78). Despite these alleged setbacks, Garda and Sun set November 15 as a tentative signing date (NYSCEF Doc No. 205, Bramson affirmation, exhibit 4, Crétier tr at 282).

In the meantime, rumors about the Transaction began to circulate within the security services industry. On September 14, Silverman texted Florian that "[t]he hearsay is that Guarda [sic] is pushing to do a deal with SOS" (NYSCEF Doc No. 449, Arnay affirmation, exhibit 17 at 2). Silverman emailed Florian three days later that "[s]omeone today at a nyc [sic] conference said they heard about us doing a deal with Garda. Same old stuff in our industry. But with this – we never had anything going on with Garda. So a bit strange. Leave it be at this point. I just said it's all garbage" (NYSCEF Doc No. 246, Bramson affirmation, exhibit 45). Silverman texted Florian on October 26 that "word is out on the street that talks are taking place. I've stated … Sun talks to everybody. That's their business" (NYSCEF Doc No. 247, Bramson affirmation, exhibit 46 at 3).

The rumors also reached Allied. Then-Allied employee Patrick McNulty (McNulty) texted Jones on November 7 "[d]on't know if there is anything to it but hit [sic] rumor (good source) had Garda picking up SOS in the VERY near future" (NYSCEF Doc No. 347, Arnay affirmation, exhibit 67). McNulty identified Jeffrey DiDomenico (DiDomenico), an executive at Valiant (Valiant), SOS's payroll services provider, as his source (NYSCEF Doc No. 429, ¶ 97). Jones also testified that two business brokers told him Garda was purchasing SOS (NYSCEF Doc No. 214 at 193-196).

On November 11, Jones reached out to Florian by email about the rumors, writing "[h]oping that it is false? Per our last several conversations with you, me and Chandler, we have been patiently waiting for you guys to complete some smaller acquisitions so we can re-value.…we still remain very interested in trying to do something with you guys" (NYSCEF Doc No. 360, Arnay affirmation, exhibit 80 at 2). Florian answered, "[l]ots of rumors out there – we have spoken to Garda just like we spoke with you and one other" (*id.*). Florian forwarded his reply to Jones's email to Kaye on November 12, to which Kaye wrote, "my hunch is you could get them to $30m over the bid. But I'm keeping my trap shut!!!" (*id.*). Florian replied that Allied had "more synergies[,] … if we do not sign by the weekend we will let [Allied] take a look, is my guess" (*id.*).

On November 12, McNulty texted Jones that the "[l]atest intel has deal closing Thursday" (NYSCEF Doc No. 359, Arnay affirmation, exhibit 79). Correspondence between Jones, Reedy, and Kaye from that date reveals their frustration at what Sun had previously told them (NYSCEF Doc No. 357, Arnay affirmation, exhibit 77). Kaye wrote Jones and Reedy that he had "asked [Sun] point blank what was happening a few weeks ago … [and] was effectively given the [H]eisman" (NYSCEF Doc No. 362, Arnay affirmation, exhibit 82 at 2). Kaye testified he told

Allied that Garda had met with Sun several months earlier and believed "something is cooking" because of Sun's refusal to share any details with him (NYSCEF Doc No. 256 at 87-89).

Jones, Reedy, and Kaye contacted Sun for clarification (NYSCEF Doc No. 361, Arnay affirmation, exhibit 81 at 2; NYSCEF Doc No. 363, Arnay affirmation, exhibit 83 at 2-3). Kaye testified that he contacted Sun "to get them to engage with me and … to engage with Allied" (*id.* at 96). Reedy reached out to Sun's co-CEO, Marc Leder (Leder) (NYSCEF Doc No. 361 at 2). Although Reedy could not recall if he and Leder spoke (NYSCEF Doc No. 215 at 172), Leder testified that during their telephone conversation, Reedy tried to convince Sun to engage with Allied (NYSCEF Doc No. 208, Bramson affirmation, exhibit 7, Leder tr at 138 and 143). Leder was sure he told Reedy "we were getting … pretty close with someone else and they would have to make it very interesting to us if we wanted to move in a different direction, that we were not under exclusivity or we couldn't talk to them at all" (*id.* at 138-139). Leder added that he did not refer to Garda by name and could not recall if Garda's name came up in their conversation (*id.* at 138 and 140).

At the same time, Florian advised Filiatrault on November 12 that Allied had learned of the Transaction and was contacting Sun "nonstop" (NYSCEF Doc No. 218 at 218-219). Crétier testified that Filiatrault told him Allied and Warburg were trying to engage with Sun, but Crétier stated that he "slept well" because he knew Sun could not reveal the existence of the Transaction or its details (*id.* at 290-291). Filitrault testified that he was unsure "if, again, Daniel was just putting pressure and using that to put on additional pressure [on Garda]. As far as I know, we were all targeting to sign I think on that Friday" (NYSCEF Doc No. 218 at 219), although "[t]here were still a few things to finalize" (*id.* at 220).

Then, on November 13, Kaye texted Jones and Reedy that he had convinced Sun that Allied was serious about acquiring SOS (NYSCEF Doc No. 363 at 2). That same day, Sun gave Allied the "[g]reen light" to negotiate a purchase (NYSCEF Doc No. 363 at 4), with Sun committing to sell if Allied's bid was the highest offer received on Sunday, November 17 (NYSCEF Doc No. 364, Arnay affirmation, exhibit 84; NYSCEF Doc No. 368, Arnay affirmation, exhibit 88). **November 15 passed without Garda and Sun signing a merger agreement**, a date notably **after** the expiration of Garda's exclusivity period ended on October 12.

Crétier testified that details for a management equity plan and employment agreements were not yet finalized (NYSCEF Doc No. 205 at 206). Filiatrault admitted that on November 15 and 16, Garda was still negotiating an outside signing date, that had been made at the request of BCP or Garda's banks (NYSCEF Doc No. 218 at 223-224).

Between November 13 and November 17, Allied completed its due diligence review and worked off the "heavily negotiated" contract between ZS and Sun when Sun purchased SOS from ZS (NYSCEF Doc No. 365-366, Arnay affirmation, exhibits 85-86). Allied bid substantially higher for SOS, and SOS and Allied executed a merger agreement on November 17 (NYSCEF Doc No. 258, Bramson affirmation, exhibit 57).

Procedural History

Garda commenced this action less than two weeks later by filing a summons and complaint asserting causes of action for breach of the Confidentiality Agreement (first cause of action); breach of the Letter Agreement (second cause of action); breach of the obligation to negotiate in good faith (third cause of action); promissory estoppel (fourth cause of action); and unjust enrichment (fifth cause of action) against Sun Partners, Sun Management, SOS, Sun SOS, LP, and Sun Holdings VI, LLC.

The complaint alleges that defendants shared specific or highly sensitive information about the potential Transaction with Allied or its representatives, including the existence or terms of the Letter Agreement, the expiration of the exclusivity period, the proposed purchase price, and the timing of the Transaction, in order to orchestrate the more lucrative transaction with Allied (NYSCEF Doc No. 1, complaint, ¶¶ 51 and 53).

In lieu of serving answers, defendants jointly moved to dismiss the complaint (NYSCEF Doc No. 16). In a decision and order dated November 9, 2020, the court (Friedman, J.) dismissed the first cause of action against Sun SOS and Sun Holdings and the second cause of action against Sun Partners, Sun Management, Sun SOS, LP and Sun Holdings VI, LLC, and denied the balance of the motion (*Garda USA, Inc. v Sun Capital Partners, Inc*., 2020 NY Slip Op 33730[U], *22-23 [Sup Ct, NY County 2020]). Significantly, Justice Friedman found the complaint did not plead that Sun Partners and Sun Management were signatories to the Letter Agreement or plead veil piercing or alter ego allegations against them on the breach of contract claims (*id.* at 20-21).

The Appellate Division, First Department modified the decision to dismiss the third, fourth and fifth causes of action against all defendants and otherwise affirmed the underlying decision (*Garda USA, Inc. v Sun Capital Partners, Inc*, 194 AD3d 545, 547-548 [1st Dept 2021]). The Appellate Division also determined that Garda could not recover its lost profits, although Garda had plausibly alleged that "it was caused to expend monies for no benefit, in reliance on defendants' contractual promise not to reveal the existence of negotiations to other entities" (*id.* at 547). Thus, the remaining claims are the first cause of action for breach of the Confidentiality Agreement against defendants and the second cause of action for breach of the Letter Agreement against SOS.

Sun and SOS served separate answers (NYSCEF Doc Nos. 89 and 90). Garda filed a note of issue and certificate of readiness on March 4, 2022 (NYSCEF Doc No. 191).

The Parties' Contentions

Defendants now jointly move for summary judgment. Garda moves separately for summary judgment. Submitted in support of the motions are the pleadings, deposition excerpts or transcripts, correspondence and expert reports and depositions.[3] The parties also submit expert reports from Jonathan F. Foster, Gustavo R. Schwed and Duncan J. Dwight.

Defendants first contend that they did not improperly disclose Garda's interest in SOS in violation of the Confidentiality and Letter Agreements (the Agreements), as Allied, Warburg and Moelis were aware of Garda's interest in acquiring SOS before execution of the Confidentiality Agreement. Similarly, defendants assert that SOS did not disclose any terms or conditions of the Transaction, that Garda's proof of an alleged breach is speculative, and that Sun cannot be liable because it was not a signatory to that agreement. Defendants further maintain that Garda cannot prevail on its claims because Garda materially breached the Agreements by repeatedly disclosing confidential information to persons or entities not authorized to receive it.

Third, defendants posit that Garda cannot establish that any alleged breach proximately caused its damages because defendants were free to negotiate with Allied and Warburg once the exclusivity period expired. Lastly, defendants maintain that any damages incurred outside the 28-day exclusivity period are not recoverable, and that Garda's damages, limited to its expenditures in the negotiation and diligence process, were not incurred in reliance on defendants' performance

[3] Garda has submitted a Statement of Material Facts (*see* 22 NYCRR 202.70 [g] [Commercial Division Rule 19-a]), but defendants have not. The parties, though, failed to comply with Rule 10 (f) (ii) of this part, available at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Part-60-Rules.pdf, which reads, "Individual Rule 19-a (a) 'Statements of Material Facts' are not permitted. The parties may, however, submit a joint/stipulated statement of undisputed facts." Nevertheless, the court shall excuse the parties' noncompliance in this instance.

on the Agreements, because defendants could freely negotiate a transaction with Allied and Warburg.

Garda argues that defendants repeatedly breached the Agreements by disclosing the existence of Transaction and its terms or conditions to Allied, Warburg and Moelis. It points to numerous emails and text messages between defendants, Allied, Moelis as direct and indirect or circumstantial evidence of the breaches, along with testimony from McNulty and DiDomenico identifying unnamed persons at SOS as the source of McNulty's information about the Transaction.

Garda also rejects defendants' contention that it breached the Agreements. It claims any breach was immaterial, and in any event, defendants waived any such breach by failing to object to the improper disclosures and by failing to seek formal amendments to Exhibit A. As for its damages, Garda also claims to have sustained millions of dollars in damages in reliance on defendants' promise to perform their contractual confidentiality obligations.

Discussion

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), including the absence of any material facts on the affirmative defenses raised in the pleadings (*see Hoffman v Wyckoff Hgts. Med. Ctr.*, 129 AD3d 526, 526 [1st Dept 2015]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met its prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324).

The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

To prevail on a cause of action for breach of contract, the plaintiff must demonstrate the existence of a contract, the plaintiff's performance, the defendant's breach and damages (*Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]). Absent the existence of a valid, enforceable agreement, a breach of contract claim will be dismissed (*see Aksman v Xiongwei Ju*, 21 AD3d 260, 261-262 [1st Dept 2005], *lv denied* 5 NY3d 715 [2005]). It is not disputed this first element has been satisfied as the Confidentiality and Letter Agreements (together, the Agreements) are enforceable contracts. Instead, the dispute centers on the last three elements. The plaintiff's performance on a contract is an essential element on a breach of contract claim (*ASKL Enters., Inc. v NYNEX Long Distance Co.*, 7 AD3d 424, 425 [1st Dept 2004]).

I. Lack of Causation

Defendants repeatedly told Garda that it was bidding against Allied, that they received an offer from Allied, and that negotiations were not bilateral except during the limited exclusivity window between September 14 and **October 12, 2019**. It is beyond dispute that Garda's exclusivity period expired without a deal. Nor did Garda have a deal in place at any time before Allied's higher offer. Therefore, to support its theory of liability Garda is left with the argument that, but for defendants' indiscretion with confidential information, it would have been Garda who had the winning bid. Under the circumstances, this is pure speculation.

The reason this theory is pure speculation is because there is no evidence in the record that defendants ever disclosed the **amount** Garda was willing to bid. Moreover, what defendants did disclose (and plaintiff's disclosures, too, for that matter) had **no impact** on Garda's losing bid. Thus, plaintiff's case fails for lack of causation.

The best plaintiff can point to is that on September 16, just two days after the Letter Agreement was signed, defendants breached their confidentiality obligations by disclosing to Kaye (defendants' alleged conduit to Allied) that "G came in w a big value and we are giving em a shot on a tight leash as of this weekend" (PX-49). Liff stated that "G was well ahead of A in timing and value" (*id.*). Liff testified that "G" referred to Garda, "big value" referred to Garda's purchase price, and "tight leash" referred to the exclusivity period (DX-50 [Liff] 200:9-201:16). However, this is NOT a disclosure of the purchase price. It is a disclosure of an exclusivity period that admittedly later expired by its terms. Therefore, this disclosure cannot have harmed plaintiff. Moreover, there is no evidence that Sun told Kaye the price, that Kaye knew the price, or that Kaye told Allied and Warburg the price. All Allied had to do was outbid, and Allied knew that it had to pay a "substantial premium" over what it had bid initially, because Dan Florian of Sun wrote to Kaye that Allied would need to pay "a significant premium" in order to win. But this email did not mention the **amount** Garda bid (NYSCEF Doc. 370).

Plaintiff's argument that, but for this disclosure, the negotiations and due diligence would have occurred faster and would have been within the exclusivity period, is highly speculative and lacks support in the record. Delays occurred on both sides, including because Garda, who originally said it would not need financing, had multiple requests for information from its potential lenders.

Garda also points out that by November 16, after the exclusivity period expired, Florian confirmed that "I'm skeptical that Allied gets to $610 M. *They know where we are*. They do not want to pay $50M more [than Garda]" (emphasis added). Florian has denied that this meant anyone had disclosed Garda's purchase price, and indeed the reference to $50M actually confirms that Allied did not know Garda's bid price. Obviously, no one would want to bid $50 million

higher than necessary. Yet, if Allied did know Garda's price, why did it ultimately bid so much higher than Garda? If Allied knew Garda's price, it could have bid much lower than it ultimately did. The bottom line is Allied's bid was substantially higher and therefore it won.

Garda cites to a text message from Chandler Reedy of Warburg saying, "I expect them to tell me exactly where Garda is," but there is no evidence that anyone did so. Additionally, Reedy testified that he never knew the price. In fact, just *three minutes* before the cited text message, Reedy asked Kaye, "Where exactly is Garda? 570 exactly. 562? 572?," and Kaye responded, "I continue not to know where they are but I am de facto assuming 570." Meanwhile, $570M was way off, and substantially higher than Garda's actual bid.

Thus, there is no evidence to support that Allied was able to outbid Garda because Allied received confidential information. If Allied outbid Garda fair and square, then Garda cannot have sustained damages because of amounts expended on due diligence and the like. There is simply no causation.

II. Substantial Performance

Moreover, defendants have established that Garda failed to substantially perform, as it committed numerous material breaches of the Agreements. Garda agreed to keep all Evaluation Material in complete confidence and share that material only with the Representatives listed on Exhibit A to the Confidentiality Agreement. Evaluation Material included the fact that the parties had or may be discussing the Transaction, its timing and status, and the negotiations between them. The Letter Agreement states that the terms or conditions of the Transaction and the contents or the existence of the Letter Agreement constitutes Evaluation Material and shall be kept confidential.

Here, Garda was aware Exhibit A could have, and should be, amended in writing, as it had requested amendments to add or remove names on that list on four separate occasions (NYSCEF

Doc Nos. 434-437, Arnay affirmation, exhibits 2-5). However, Garda shared confidential Evaluation Material with numerous persons or entities who were not listed on Exhibit A.

Crétier forwarded confidential material, including financial information about SOS, to Notarnicola on August 12 and September 5 (NYSCEF Doc No. 220, Bramson affirmation, exhibit 19; NYSCEF Doc No. 242, Bramson affirmation, exhibit 41). Notarnicola is not listed on Exhibit A, and Garda's transaction with BCP had not closed by that time[4] (NYSCEF Doc No. 207, Bramson affirmation, exhibit 6, Morin tr at 73; NYSCEF Doc No. 218 at 129).

In August, Morin discussed SOS's paid-in-kind, or PIK, debt with Adam Gross (Gross) of BCP (NYSCEF Doc No. 207, Bramson affirmation, exhibit 6, Morin tr at 64 and 72-73; NYSCEF Doc No. 218 at 123-124). Gross contacted other BCP employees on August 9 for "market intel on SOS" (NYSCEF Doc No. 227, Bramson affirmation, exhibit 26 at 6). This prompted Mitch Schinbein (Scheinbein) to reach out to "Varagon (one of the lead lenders on [SOS's] unitranche financing" to check for documents (*id.*).

Notably, Morin advised Gross that he wanted to be "mindful of confidentiality when reaching out to external parties" (*id.* at 5). When Gross also suggested reaching out to Ares, Morin responded that doing so was "fine if you deem there is minimal leak potential"[5] (*id.* at 4). Although Garda requested that Sun give Gross access to the virtual data room on September 10 (NYSCEF Doc No. 433, Arnay affirmation, exhibit 1), his name was not added to Exhibit A until September 13 (NYSCEF Doc No. 285). Scheinbein and the other BCP employees on the email thread beginning August 9 are not listed on any of the amendments.

[4] On September 30, Morin emailed Joblove that Crétier's name should have been included on Exhibit A (NYSCEF Doc No. 435, Arnay affirmation, exhibit 3).

[5] Ares, an investment firm, was the lead investor on SOS's PIK (NYSCEF Doc No. 218 at 125).

In October, Crétier discussed the Transaction with Garda employees, Prentice Robertson and Isabelle Panelli, neither of whom are listed on Exhibit A (NYSCEF Doc No. 225, Bramson affirmation, exhibit 24; NYSCEF Doc No. 243, Arnay affirmation, exhibit 42).

Between November 9 and 12, Morin and Belzile furnished TD Securities, JPMorgan, Bank of America, Barclays and Apollo with quality of earnings and legal diligence memoranda, audited financial statements, estimated financial projections and models, and other information (NYSCEF Doc Nos. 230, 234-241, Arnay affirmation, exhibits 29 and 33-40). BCP employees David Leland and Chloe Colberg forwarded confidential information to TD Securities, including a "highly confidential" presentation and a confidential information memorandum (NYSCEF Doc No. 263 at 81-83 and 89-90). On November 14, Garda requested data room access for Cahill Gordon, a representative for one of Garda's potential lenders (NYSCEF Doc Nos. 439-440, Bramson affirmation, exhibits 7-8). Aon appears on the fourth amendment to Exhibit A (NYSCEF Doc No. 288), but AIG Specialty Insurance Company (AIG) does not.

Garda also shared confidential information with PwC Canada,[6] CT Lien and three rating agencies, Standard & Poor's, Moody's, and Fitch (NYSCEF Doc No. 210 at 151). Morin provided a copy of a confidential slide deck to Standard & Poor's (NYSCEF Doc No. 233, Bramson affirmation, exhibit 32), and Filiatrault set up a meeting between Deloitte and PwC Canada to discuss the Transaction (NYSCEF Doc No. 218 at 204).

"It is well settled that 'a party who seeks to recover damages from the other party to the contract for its breach must show that he himself is free from fault in respect of performance'" *County of Jefferson v Onondaga Dev., LLC*, 151 AD3d 1793, 1795 [4th Dept 2018], quoting

[6] PwC Canada is BCP's tax advisor (NYSCEF Doc No. 218 at 204). "PwC" also appears to serve as defendants' "tax guys," and assisted them in furnishing information responsive to Garda's tax request list (NYSCEF Doc No. 446, Arnay affirmation, exhibit 15).

Rosenthal Co. v Brilliant Silk Mfg. Co., Inc., 217 App Div 667 [1st Dept 1926]; *see also Dorfman v American Student Assistance*, 104 AD3d 474 [1st Dept 2013] [granting summary judgment to the defendant where the "[p]laintiff failed to allege, let alone establish, her own performance under the contract, a necessary element of her breach of contract claim"]). "[W]hen a party to a contract materially breaches that contract, it cannot then enforce that contract against a non-breaching party" (*PDL Biopharma, Inc. v Wohlstadter*, 2019 NY Slip Op 32693[U], *21-22 [Sup Ct, NY County 2019] [internal quotation marks and citation omitted]). A breach is considered material if it is "substantial enough to defeat the parties' objectives in making the contract" (*Alberts v CSTV Networks, Inc.*, 96 AD3d 447, 447 [1st Dept 2012]). Stated another way, the breach must "'go[ ] to the root of the agreement between the parties'" (*Trump v Trump*, 2023 NY Slip Op 23180, *8 [Sup Ct, NY County 2023] [citation omitted]), because "technical or unimportant omissions or defects in the performance" will not preclude recovery (*Porter v Traders' Ins. Co.*, 164 NY 504, 509 [1900].

Factors to consider when determining whether a party has committed a material breach include "the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance" (*Hadden v Consolidated Edison Co. of N.Y.*, 34 NY2d 88, 96 [1974]). "In most cases, … 'the question of materiality of breach is a mixed question of fact and law usually more of the former and less of the latter and thus is not properly disposed of by summary judgment'" (*CMI II, LLC v Interactive Brand Dev., Inc.*, 13 Misc 3d 1214[A], 2006 NY Slip Op 51818[U], *9 [Sup Ct, NY County 2006], quoting *Bear, Stearns Funding, Inc., v Interface Group-Nevada, Inc.*, 361 F Supp 283, 295 [SD NY 2005]). However, whether a breach

is material may be decided as a matter of law (*see Star City Sportswear, Inc. v Yasuda Fire & Mar. Ins. Co. of Am.*, 2 NY3d 789, 790 [2004]; *Anderson Clayton & Co. v Alanthus Corp*., 91 AD2d 985, 985 [2d Dept 1983] [citation omitted] ["Although the issue of substantial performance is usually one of fact, 'if the inferences are certain, the question involves only a matter of law and is to be decided by the court'"]).

Contrary to Garda's contention, its breaches are material to the Agreements (*Nanomedicon, LLC v Research Found. of State Univ. of N.Y.*, 112 AD3d 593, 594 [2d Dept 2013], *lv dismissed* 23 NY3d 1030 [2014] [granting summary judgment dismissing breach of contract claims where the plaintiff materially breached the agreement]; *Ledy v Wilson*, 40 AD3d 239, 240 [1st Dept 2007] [dismissing a breach of contract claim where the plaintiffs breached the parties' agreement and where the agreement's noncompete provision was widely known in the parties' industry]).

The very purpose of the Confidentiality Agreement, and by extension, the Letter Agreement, was to keep Evaluation Material confidential during negotiations on the Transaction (*see e.g. Gate Tech., LLC v Delphix Capital Markets, LLC*, 2013 WL 3455484, *1, 2013 US Dist LEXIS 95368, *2 [SD NY, July 9, 2013, No. 12 Civ. 7075(JPO)] ["The purpose of the nondisclosure agreement was to protect confidential information among the parties as they engaged in various negotiations"]). Garda was aware that only those Representatives listed on Exhibit A were authorized to receive confidential Evaluation Material, but it failed to abide by its contractual obligation to secure defendants' prior, mutual written consent before disseminating that information.

Garda's argument, that defendants waived any objection to the disclosure of Evaluation Material to persons or entities not listed on Exhibit A, is unpersuasive. "A waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish

it" (*Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 465 [2006] [internal quotation marks and citation omitted]).

As is relevant here, the Confidentiality Agreement contains a no-waiver clause, and courts generally will enforce contractual no-waiver provisions (*see Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). That said, "the existence of a nonwaiver clause does not in itself preclude waiver of a contract clause" (*Dice v Inwood Hills Condominium*, 237 AD2d 403, 404 [2d Dept 1997]). The waiver of a contractual right "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006] [internal quotation marks and citation omitted]). Because a waiver "should not be lightly presumed," whether one party has waived a contract term is ordinarily a question of fact (*id.* [internal quotation marks and citation omitted]).

Garda claims defendants never objected to the disclosure of Evaluation Material to BCP, its lenders and others who were working on Garda's behalf to further the Transaction. Garda relies, in part, on an email from Liff dated July 19, in which Liff described a discussion with Crétier to others at Sun. Liff wrote that he had expressed the "need" for Garda's "new pe firm to be on board" (NYSCEF Doc No. 300, Arnay affirmation, exhibit 20). Liff's email, though, is dated **before** the Confidentiality Agreement was executed, and there is no indication that he and Crétier discussed the extent to which Garda would disclose material to BCP.

Garda contends that defendants were aware of its need to seek out debt financing, and cites internal emails at Sun dated November 7 and 8 in which Florian and Liff advised Leder and others that Garda was "getting their lenders up to speed" (NYSCEF Doc No. 348, Arnay affirmation, exhibit 68), and that "[Garda's] [b]anks are lined up, but they need to provide some info"

(NYSCEF Doc No. 355, Arnay affirmation, exhibit 75). Garda asserts that defendants never insisted the parties formally amend Exhibit A to include its partners, but this is inaccurate.

In at least once instance, Brian Krouskos, an associate at Sun, appeared to have granted Morin's request for access to the virtual data room for AIG and its counsel, Squire Patton Boggs, but reminded Garda that they would "circle back on the NDA" (NYSCEF Doc No. 437). Moreover, Garda was aware the Confidentiality Agreement limited knowledge of the Transaction to those individuals listed on Exhibit A (NYSCEF Doc No. 435).

"[A] finding of waiver cannot be based upon 'mere silence or oversight,' or upon 'mistake, negligence or thoughtlessness'" (*Homapour v Harounian*, 200 AD3d 575, 576 [1st Dept 2021] [citations omitted]). Even "'[p]assive acceptance'" does not equate to "'active involvement' sufficient to raise an issue of fact as to waiver" (*BDCM Opportunity Fund II, LP v Yucaipa Am. Alliance Fund I, LP*, 112 AD3d 509, 511 [1st Dept 2013], *lv denied, lv dismissed* 22 NY3d 1171 [2014] [citation omitted]). Given the express no-waiver clause in the Confidentiality Agreement, defendants' knowledge that Garda was disbursing confidential information to persons or entities not identified on Exhibit A does not manifest a clear intent to waive confidentiality (*see Fairmont Tenants Corp. v Braff*, 162 AD3d 442, 442 [1st Dept 2018]; *Awards.com*, 42 AD3d at 188 [waiver not found where the plaintiff failed to furnish any evidence the defendant knowingly and intentionally agreed to waive future payments due on their agreement]).

Garda cites to *Parlux Fragrances, LLC v S. Carter Enters., LLC* (204 AD3d 72 [1st Dept 2022]) (*Parlux*), for the proposition that if the plaintiff materially breaches an agreement, then the defendant may choose to continue the agreement or terminate it and sue for breach (*id*. at 90). But, if the defendant chooses to continue despite a material breach, then the defendant's performance under that agreement is not excused (*id*.). This argument, however, concerns the election of

remedies doctrine, and the Court in *Parlux* stated that "[w]aiver and election of remedies are technically distinct doctrines" (*id.* at 87 n 11). In any event, if the defendant elects to continue with an agreement after the plaintiff's material breach, the defendant is foreclosed from or waives its right to terminate the agreement, not that the breach itself is immaterial.

Garda next claims that Sun verbally authorized its disclosure of confidential information to its potential lenders, but Florian's testimony that he could not recall Garda ever asking for permission to do so (NYSCEF Doc No. 250 at 91) fails to satisfy Garda's heavy burden of demonstrating a waiver. Garda simply ignores the contractual requirement that only those identified in Exhibit A may receive Evaluation Material, and the list may be amended upon mutual written agreement.

Garda's contention that it cannot have breached the Confidentiality Agreement because each lender executed a joinder agreement agreeing to be bound to the Confidentiality Agreement as Garda's "Representative" is unpersuasive. There is no evidence the joinder agreements were furnished to defendants (NYSCEF Doc No. 210 at 142), if defendants were informed that these agreements had been executed, or if defendants consented to the execution of these side agreements. Incidentally, Garda had also approached Scotia Bank (NYSCEF Doc No. 210, Bramson affirmation, exhibit 9, Prince 10/21/21 tr at 152), but Garda has not furnished an executed joinder agreement from that entity. Garda makes no argument whether PwC Canada or the three ratings agencies were covered under a pre-existing nondisclosure agreement.

Defendants also are under no obligation to furnish proof of their damages from Garda's material breaches, as Garda has suggested, as defendants have not asserted a counterclaim for breach of contract. In any event, Joblove, a Vice President at Sun, testified that Sun's objective in securing a confidentiality agreement from Garda was "to protect SOS … because Garda was seen

as a competitor" (NYSCEF Doc No. 262, Bramson affirmation, exhibit 61, Joblove tr at 19 and 99-100). Garda does not dispute that it was one of SOS's competitors during negotiations. Finally, the issue with respect to the second element on a breach of contract claim is Garda's performance, and Garda cannot establish its substantial performance. Accordingly, Garda cannot recover on its first and second cause of action because it cannot establish that it substantially performed its obligations under the Agreements.

In view of the foregoing, the court need not address the other arguments advanced by the parties on their motions. Nevertheless, the court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that the motion of defendants Sun Capital Partners, Inc., Sun Capital Partners Management VI, LLC, and SOS Ultimate Holding, LLC for summary judgment dismissing the complaint (Motion Sequence No. 010) is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion of plaintiff Garda USA, Inc. for summary judgment in its favor (Motion Sequence No. 011) is denied.

7/7/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE